Supreme Court, U.S.
FILED
SEP 1 - 2005
OFFICE OF THE CLERK

No. 05-292

In The
Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

PHILECIA BARNES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JULIA L. MCNEIL
City Solicitor

RICHARD GANULIN*
Assistant City Solicitor

AUGUSTINE S. GIGLIO
Assistant City Solicitor

Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3329
(513) 352-1515 FAX
richard.ganulin@cincinnati-oh.gov
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, create a cause of action for intragender discrimination based on sex stereotyping?

2) Does a transsexual have standing to bring a Title VII action for intragender discrimination based on sex stereotyping?

3) Is it reversible error for the trial court to give a mixed-motive jury instruction under 42 U.S.C. 2000e-2(m) in a Title VII pretext case?

4) Does the similarly situated comparable employee in a Title VII disparate treatment case have to work with the same decisionmaker?

5) Does a district court abuse its discretion under *Blanchard v. Bergeron* by awarding $527,888 attorneys' fees in a failure to promote case?

LIST OF PARTIES

Petitioner: City of Cincinnati, Ohio

Respondent: Philecia (a.k.a. Phillip) Barnes

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS UNDER *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989), WHETHER TITLE VII CREATES A CAUSE OF ACTION FOR INTRAGENDER DISCRIMINATION BASED ON SEX STEREOTYPING	7
II. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS WHETHER A TRANSSEXUAL MAY BRING A TITLE VII CAUSE OF ACTION FOR INTRAGENDER DISCRIMINATION BASED ON SEX STEREOTYPING	11
III. THIS COURT'S DECISION IN *DESERT PALACE, INC. V. COSTA* MISLED THE SIXTH CIRCUIT INTO ERRONEOUSLY AFFIRMING TITLE VII MIXED-MOTIVE JURY INSTRUCTIONS IN THIS TITLE VII PRETEXT CASE AND ELIMINATING THE PLAINTIFF'S PROPER BURDEN OF PROOF	12

TABLE OF CONTENTS – Continued

Page

IV. THE SIXTH CIRCUIT ERRONEOUSLY ELIMINATED THE TITLE VII REQUIREMENT THAT A PLAINTIFF PROVE THAT A SIMILARLY SITUATED EMPLOYEE OUTSIDE HIS PROTECTED CLASS WORKED WITH THE SAME DECISIONMAKER 15

V. AN ATTORNEY FEE AWARD OF $527,888 IN A FAILURE TO PROMOTE CASE IS AN ABUSE OF DISCRETION UNDER *BLANCHARD V. BERGERON* 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Anthony v. BTR Auto. Sealing Sys., Inc., 339 F.3d 506 (6th Cir. 2003) 13

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) 2

Blanchard v. Bergeron, 489 U.S. 87 (1989) 16

Brown v. Packaging Corporation of America, 338 F.3d 586 (6th Cir. 2003) 13

Cicero v. Borg-Warner Automotive, Inc., 280 F.3d 579 (6th Cir. 2002) 14

Dawson v. Bumble & Bumble, 398 F.3d 211 (2nd Cir. 2005) 9

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 13, 18

Dews v. A.B. Dick Co., 231 F.3d 1016 (6th Cir. 2000) 14

Dobre v. National R.R. Passenger Corp., 850 F.Supp. 284 (E.D.Pa. 1993) 9

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) 15

Farmer v. Brennan, 511 U.S. 825 (1994) 2, 11

Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058 (7th Cir. 2003) 8

J.E.B. v. Alabama, 511 U.S. 127 (1994) 8

James v. Ranch Mart Hardware, Inc., 881 F.Supp. 478 (D.Kansas 1995) 10

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 13

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992) 15

Moorer v. Baptist Memorial Health Care System, 398 F.3d 469 (6th Cir. 2005) 14

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 8

Nichols v. Azteca Restaurant Enterprises, 256 F.3d 864 (9th Cir. 2001) 10

Noble v. Brinker International, Inc., 391 F.3d 715 (6th Cir. 2004) 15

Oiler v. Winn-Dixie Louisiana, Inc., 2002 WL 31098541 (E.D. La. 2002) 9, 10

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 7, 11

Quinn v. Nassau County Police Dept., 75 F.Supp.2d 74 (E.D.N.Y. 1999) 17

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 15

Rentos v. Oce-Office Systems, 1996 WL 737215 (S.D.N.Y. 1996) 9

Ruth v. Children's Medical Center, 940 F.2d 662 (6th Cir. 1991) 10

Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004) 6

Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982) 9

Sweet v. Mulberry Lutheran Home, 2003 WL 21525058 (S.D. Ind. 2003) 9

TABLE OF AUTHORITIES – Continued

Page

Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1985) 9

Underwood v. Archer Management Services, Inc., 857 F. Supp. 96 (D.D.C. 1994) 10

Wexler v. White's Fine Furniture, 317 F.3d 564 (6th Cir. 2003) (*en banc*) 14

Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989) 10

Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996) 10

STATUTES:

28 U.S.C. 1254 2

28 U.S.C. 1343 3

42 U.S.C. 2000e *et seq.* 2, 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner, City of Cincinnati, respectfully prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

In this alleged sex stereotyping discrimination case filed by Respondent Phillip (now Philecia) Barnes ("Barnes"), a homosexual/transsexual police officer of the City of Cincinnati, the District Court stated that the officer's "counsel were extremely creative in fashioning her case as a Title VII . . . case. . . ." App. 44. The judgment of the United States District Court, Southern District of Ohio, Western Division, was filed on August 6, 2003, after a trial before a jury. App. 31-32. Even though the District Court had held that Barnes "is a member of a protected class – men," but without any proof that Chief of Police Streicher treated Barnes differently than a similarly situated woman, the judgment awarded Barnes $150,000 in compensatory damages, $140,000 in front pay, and $30,511 in back pay. The District Court had previously denied the City's motion to dismiss, motion for summary judgment, and motion for judgment. The District Court's judgment enjoined the City from retaliating against Barnes or discriminating against Barnes "on the basis of her perceived sexual orientation, gender identity, transsexuality, or her failure to conform to sex stereotypes." *Id.* The District Court denied the City's post-trial motions for judgment and for new trial. The District Court further awarded Barnes $527,888 in attorneys' fees and $25,837 in costs. App. 48.

On March 22, 2005, a panel of the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and the award of fees and costs to Barnes. App. 1-30; 401 F.3d 729. The order of the United States Court of Appeals denying the City's Petition for Rehearing *En Banc* was issued on June 8, 2005. App. 78.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 to review the opinion of the United States Court of Appeals for the Sixth Circuit denying the City's Petition for Rehearing *En Banc* on June 8, 2005, and the opinion of the Court of Appeals issued on March 22, 2005.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

STATEMENT OF THE CASE

Barnes was a pre-operative male transsexual[1]/homosexual police officer in the Cincinnati Police Department since 1981. Barnes sometimes appeared at work

[1] A transsexual is "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex'...." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). Barnes admitted that transsexualism "is a short-hand for the psychological diagnosis of gender identity disorder."

with noticeable pink makeup, long fingernails, nail polish, arched eyebrows, etc. He often appeared as a woman off-duty. The Sixth Circuit panel noted that "Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser." The panel added: "Barnes' ambiguous sexuality and his practice of dressing as a woman outside of work were well-known within the CPD."

In 1998, Barnes passed the sergeant's promotion exam. In 1999, after the first month of Barnes' sergeant's probation period, it was clear to Barnes' supervisors that Barnes was having difficulty fulfilling the responsibilities of the sergeant's position. Barnes was provided special training and mentoring, but continued to struggle. The Chief of Police overruled the first recommendation to fail Barnes from probation. Subsequently, however, the Chief failed Barnes from sergeant's probation due to significant and uncontroverted inadequate performance. Barnes resumed his responsibilities as a police officer.

Asserting federal jurisdiction under 42 U.S.C. 2000e-5(f) and 28 U.S.C. 1343(3) and (4), Barnes filed Title VII and equal protection claims against the City of Cincinnati in federal court alleging that the Chief of Police failed him from probation due to his transsexual/homosexual characteristics. Barnes alleged in his complaint that he was "demoted because he is a transsexual who did not conform to typical heterosexual male stereotypes." He further alleged in the complaint that he "is a transsexual male" whose "sexual orientation was not heterosexual" and that he was "demoted for two reasons. One reason was because he was a transsexual.... The second reason is that [he did] not have a heterosexual orientation." Barnes later argued to the jury and publicly announced after trial that he was allegedly treated differently because he was a transsexual: "[A]

federal court jury found that the City of Cincinnati discriminated when it demoted Barnes from police sergeant because she was a transsexual." Over repeated objection by the City, the District Court instructed the jury to decide whether the City had discriminated against Barnes based on sex stereotyping.

The record established that Barnes was unable to properly perform the very significant responsibilities of police sergeant. His counsel conceded that "there really were a lot of examples of mistakes. . . . And we don't deny that." Barnes' counsel compared Barnes to another male officer who also "really screwed up on probation." Barnes himself told Chief of Police: "I just don't know if I'm cut out for this." He admitted that he needed to improve in numerous areas such as time management, computer skills, paperwork, lineups, electronic mail, grammar, sentence structure, etc. He characterized his own behavior during probation as "bizarre" and untruthful. His expert witness conceded that Barnes was "on the low end" of all probationary sergeants.

The panel acknowledged that it "may have reached a different conclusion sitting as the finder-of-fact," that "the City offers a plausible explanation of what the evidence showed at trial," and that "the City's interpretation of the evidence is itself reasonable."[2] There is no direct or circumstantial evidence in the record that the Chief of Police treated Barnes differently than a similarly situated female probationary sergeant. No police officers, men or women,

---

[2] The Sixth Circuit panel did not address the City's challenge to Barnes' equal protection claim since the panel upheld the Title VII verdict. App. 18.